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No. 99-1235

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP.–ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND NATIONAL HOME EQUITY MORTGAGE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 14
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This *amici curiae* brief is submitted in support of the Petitioners, Green Tree Financial Corp.– Alabama and Green Tree Financial Corporation. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, or their counsel.

INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the 50 states and the District of Columbia and includes banks of all types and sizes – money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance and concern to banks or consumers of banking services. ABA members regularly include arbitration agreements in their consumer loan documents and deposit contracts.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently owned consumer finance offices to the nation's largest financial services, retail and automobile companies. The AFSA's membership includes national and state banks that operate multi-state consumer credit programs. AFSA's members regularly include arbitration agreements in their consumer loan documents.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity and education finance, bank sales of investment products, small business services and community development. CBA members regularly include arbitration agreements in their consumer loan documents and deposit contracts.

The National Home Equity Mortgage Association ("NHEMA") is a national trade organization whose members include lenders and others involved in home equity mortgage lending. NHEMA members frequently include arbitration agreements in contracts and rely upon their enforceability.

SUMMARY OF ARGUMENT

Members of the *amici* organizations rely upon arbitration to resolve disputes with their customers in a fair, inexpensive and efficient manner. In entering into arbitration agreements, banks and other financial institutions rely on the enforceability of those agreements in the federal courts, in keeping with the strong federal policy in favor of arbitration embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Under the FAA, a party to an arbitration agreement should not be routinely required to engage in extensive, multi-level court proceedings to vindicate its federal right to arbitrate a dispute.

The Eleventh Circuit has made the court process longer and harder in two ways, clashing with other circuits on both points. First, the Eleventh Circuit ruled, contrary to at least five other circuits, that it has jurisdiction over an appeal from an order compelling arbitration even when there are other legal issues that remain to be resolved by the arbitration. Under this view, appeal is immediate and arbitration is delayed. Second, the Eleventh Circuit ruled that an arbitration agreement is unenforceable if it fails to make clear what arbitration will cost. This ruling conclusively resolved doubts about the costs of arbitration *against* the party seeking enforcement. The court's reasoning conflicts with this Court's approach to arbitration issues generally, and with decisions of other courts of appeals on the specific issue of arbitration costs.

Together, the Eleventh Circuit's rulings on its appellate jurisdiction and on the burden of proving arbitration costs will

mean lengthier and more costly court processes, forum shopping to avoid arbitration, less likelihood that disputes will be arbitrated, and uncertainty about rights under existing and future agreements that will discourage reliance on arbitration. This Court should grant certiorari to re-establish certainty regarding the enforcement of the arbitration clauses in tens of millions of consumer contracts.

ARGUMENT

I. THE COURT OF APPEALS DECISION THAT IT HAS APPELLATE JURISDICTION WHENEVER A CASE IS DISMISSED IN FAVOR OF ARBITRATION PRESENTS A SIGNIFICANT QUESTION ON WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

The Eleventh Circuit's decision deepens an existing split among the courts of appeals regarding their jurisdiction to hear appeals of orders compelling arbitration. As the Eleventh Circuit acknowledged, at least five circuits interpret section 16(a)(3) of the FAA to deny them jurisdiction to review orders compelling arbitration that are "embedded" in a controversy that includes other legal issues. (Pet. App. 7a-8a.) Here, the arbitration issue is embedded in a federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, lawsuit. Accordingly, at least five circuits would have declined to review the district court's order compelling arbitration until the arbitration process had resolved the Truth-in-Lending Act claim. In opting to exercise its jurisdiction prior to the arbitration, the Eleventh Circuit joined the two circuits that treat all orders dismissing cases in favor of arbitration as "final decisions" appealable under section 16(a)(3) of the FAA. (Pet. App. 9a, 11a-12a.)

This split among the circuit courts has powerful adverse consequences for the usefulness of arbitration agreements. One of the fundamental purposes of the FAA is to help arbitration fulfill its potential to streamline dispute resolution. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing legislative history); *see also Ex parte McNaughton*, 728 So. 2d 592, 597 (Ala. 1998) ("[A] party, by agreeing to arbitrate . . . trades the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.") (internal quotations and citation omitted), *cert. denied*, 120 S. Ct. 59 (1999). The benefits of arbitration are lost if arbitration itself can be obtained only after prolonged litigation. *See Allied-Bruce*, 513 U.S. at 282 (O'Connor, J., concurring). In contrast, allowing the arbitration to go forward "promotes both the pro-arbitration purposes of the FAA and the institutional goal of avoiding piecemeal appeals and systemic delays." *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 629 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *see also Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (review of embedded orders undermines the purposes of the FAA).

Absent review by this Court, the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), will continue to be eroded by those circuits that apply the minority rule allowing immediate appeals. Moreover, the availability of two different rules regarding appellate jurisdiction will sow confusion and encourage forum-shopping, as plaintiffs seeking to avoid arbitration, like the respondent in this case, file suit whenever possible in a district court located in a circuit where an arbitration order will be immediately appealable. Finally, the availability of an immediate appeal dramatically affects the cost-benefit analysis that the members of *amici*, and other banks and businesses, must consider before offering

arbitration to their customers. The minority rule on the timing of appeals thus discourages the use of arbitration. This Court should grant certiorari in order to create a uniform rule on this important issue.

II. THE COURT OF APPEALS DECISION THAT AN ARBITRATION AGREEMENT IS UNENFORCEABLE WHENEVER THE RECORD DOES NOT ESTABLISH THE COSTS OF THE ARBITRATION ALSO PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ON WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. "[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce*, 513 U.S. at 270 (citation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).[2] In keeping with the FAA, this Court has emphatically rejected "the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989) (citation omitted). "[S]uspicion of arbitration . . . has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 481; *see also Gilmer*, 500 U.S. at 30. Instead, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should

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[2] Congress has continued to encourage the use of arbitration. *See, e.g.*, Y2K Act, Pub. L. No. 106-37 § 2(a)(8), (b)(3), 113 Stat. 185, 186-87 (1999) (encouraging arbitration of Y2K disputes). In doing so, Congress cited the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes," adding that "small businesses and individuals . . . already find [the legal] system inaccessible because of its complexity and expense." *Id.* § 2(a)(3)(B)(iii), (iv).

be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (citations omitted).

This general rule of resolving doubts in favor of arbitration has been applied by this Court in the face of allegations that arbitrators might be biased, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("[w]e decline to indulge the presumption" that a forum will not find competent and unbiased arbitrators), or might fail to follow the law, *see Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987). Other cases, in the lower courts, have involved the question whether arbitration fees and other costs might be so high as to warrant denying an order to arbitrate. In those cases, other circuits, following *Moses H. Cone*, *Mitsubishi* and *McMahon*, have resolved doubts about arbitration fees in favor of arbitration. *See Dobbins v. Hawk's Enters.*, 198 F.3d 715 (8th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

The Eleventh Circuit, by contrast, conclusively resolved what was at most a doubt about the reasonableness of arbitration costs *against* arbitration. The court began by asserting that "[t]he arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses." (Pet. App. at 17a.) But the clause itself raises no such concerns: the relevant provision is silent on each of these issues. The Eleventh Circuit simply imagined the possibility that respondent *might* face "steep filing fees, steep arbitrators' fees, or other high costs" (Pet. App. at 18a) and declared the arbitration agreement therefore unenforceable. Its action was squarely in conflict with the principle that any doubts

about the contract language should be resolved in favor of arbitration. *See Moses H. Cone*, 460 U.S. at 24-25.

The Eleventh Circuit's decision conflicts more broadly with this Court's arbitration jurisprudence. It is a throwback to the suspicion of arbitration found in cases such as *Wilko v. Swan*, 346 U.S. 427, 432, 435 (1953) (agreeing with Petitioners contention that "arbitration lacks the certainty of a suit at law . . . to enforce . . . rights" under the Securities Act of 1933), *overruled by Rodriguez de Quijas*, 490 U.S. at 484 (holding *Wilko* to be "seriously erroneous"). It also effectively places the burden on the party seeking to enforce its arbitration agreement to prove that arbitration costs will not be high. But *Moses H. Cone*, *Mitsubishi* and *McMahon* make it clear that the party seeking arbitration should not have to prove that the arbitration process is without flaw.

The Eleventh Circuit's decision conflicts directly with decisions of other circuits that have ruled on similar challenges to arbitration fees. The conflict is illustrated by the recent Eighth Circuit case of *Dobbins*. *See* 198 F.3d 715. In *Dobbins*, plaintiffs filed suit seeking damages for alleged violations of the federal Truth-in-Lending Act. The district court initially granted defendants' motion to compel arbitration and stayed the litigation. The plaintiffs subsequently moved to lift the stay on the ground that the fees to be imposed by the American Arbitration Association ("AAA") would prevent them from effectively asserting their claims. The district court lifted the stay, concluding that the $23,000 "final fee determination" precluded them from "availing themselves of the arbitral forum." *Id.* at 716-17. The Eighth Circuit reversed, citing the strong federal policy in favor of arbitration, and resolved doubts about

arbitration costs (there, on the issue of whether a fee reduction could be arranged) in favor of arbitration. *Id.*[3]

The Eleventh Circuit's decision is also in conflict with *Rosenberg*, in which the First Circuit rejected an argument that the New York Stock Exchange's arbitration procedures were unenforceable because plaintiffs might be assessed high fees or costs by the arbitration panel. *See* 170 F.3d 1. Unlike the Eleventh Circuit, the First Circuit had a record that demonstrated that steep fees were a real possibility: plaintiffs could be charged fees "which may be as high as $3,000 per day and tens of thousands of dollars per case." *Id.* at 15. Rather than using this data to defeat arbitration, the First Circuit explained that the appropriate remedy for excessive fees is provided by judicial review of a completed arbitration process — not by nullification of the arbitration agreement itself:

> [I]f unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the [statute at issue] could be presented by the employee to the reviewing court. That issue is not presented by this case.

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[3] In contrast to the Eleventh Circuit's decision, *Dobbins* is also consistent with section 10 of the FAA, which requires that plaintiffs avail themselves of the arbitral forum before complaining about it. *See* 9 U.S.C. § 10; *see also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) ("The language of the Act is unambiguous: it is only after an award has been made by the arbitrators that a party can seek to attack any of the arbitrators' determinations in court . . . ."); *Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) ("By its own terms, § 10 authorizes court action only after a final award is made by the arbitrator.") (citation omitted). By limiting challenges until after the arbitration has occurred, the FAA provides the parties with an opportunity to replace their concerns with actual experience of the arbitrator and forum. This approach reduces judicial involvement because the arbitrator's decision on fees (or on the merits) may eliminate the need for any judicial involvement. *See Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 330 (D. Md. 1999).

> As *Gilmer* said, "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."

Id. at 16 (quoting *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232)) (internal citation omitted); *accord Koveleskie v. SBC Capital Mkts.*, 167 F.3d 361, 366 (7th Cir.) (rejecting argument that arbitration clause was invalid because of potentially high arbitration fees), *cert. denied*; 120 S. Ct. 44 (1999).

In *Cole*, as in the case below, the arbitration clause was silent on the issue of arbitration fees. *See* 105 F.3d at 1469. However, the D.C. Circuit enforced the arbitration clause by simply "interpret[ing] the agreement as requiring [defendant] to pay all of the arbitrator's fees necessary for a full and fair resolution of [plaintiff's] statutory claims." *Id.* at 1485. Contrary to the holding of the Eleventh Circuit here, the D.C. Circuit interpreted the clause in such a manner because "[i]t is well understood that, where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful." *Id.* at 1485-86 (citations omitted).[4]

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[4] *Howard v. Anderson*, 36 F. Supp. 2d 183 (S.D.N.Y. 1999) is also instructive. In *Howard*, the plaintiff challenged an arbitration clause on the ground that she would be required "to pay a host of fees and an additional $2500 filing fee at the conclusion of her case." 36 F. Supp. 2d at 187. The court rejected plaintiff's arguments on the ground that she had "failed to present evidence that those fees have been demanded of her at this time. Ultimately, [plaintiff] may not be responsible for any fees." *Id.* The court also refused to assume that the arbitrator would require the plaintiff to pay an unreasonable fee: "*The Court is confident that once the relevant law is brought to the arbitrator's attention, he will conduct a proceeding that will vindicate Howard's statutory rights.*" *Id.* (emphasis added and citation omitted).

The decision of the Eleventh Circuit is wholly at odds with these and other decisions of other court of appeals. If the decision below is permitted to stand, it will create substantial confusion in the law governing the enforcement of arbitration agreements where the fees are unknown, or known to be potentially substantial. The Eleventh Circuit decision also conflicts more broadly with circuit court decisions that place the burden of proof about arbitration procedures on the party seeking to invalidate the arbitration agreement. *See, e.g.*, *Koveleskie*, 167 F.3d at 366 (placing burden of proof on party seeking to avoid arbitration); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (same), and with an array of decisions enforcing arbitration provisions in accordance with their terms. *See, e.g.*, *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (arbitration clause in consumer loan transaction); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (arbitration clause in standard form contract to purchase computer). Indeed, numerous courts around the country have enforced the very arbitration clause at issue in this case,[5] including, after the

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[5] *See, e.g.*, *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (compelling arbitration of RICO and state law claims); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp. 2d 804 (N.D. Ill. 1999) (compelling arbitration of Truth-in-Lending Act and state law claims); *In re Pate*, 198 B.R. 841 (Bankr. S.D. Ga. 1996) (plaintiff ordered to arbitrate fraud and other claims against Green Tree); *Green Tree Fin. Corp. v. Wampler*, No. 1970983, 1999 WL 667292 (Ala. Aug. 27, 1999) (compelling arbitration of fraud and unfair trade practices claims); *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) (enforcing Green Tree arbitration clause and requiring challenge to validity of arbitration clause to be arbitrated); *Ishmael v. Dutch Housing, Inc.*, No. 96-AP-100084, 1997 Ohio App. LEXIS 3974 (Aug. 13, 1997) (enforcing Green Tree arbitration clause and ordering arbitration of breach of warranty and unfair trade practices claims), *appeal dismissed*, 687 N.E.2d 472 (Ohio 1997); *Ex parte Parker*, 730 So. 2d 168 (Ala. 1999) (plaintiff ordered to arbitrate breach of contract and fraud claims under Green Tree arbitration

Eleventh Circuit's decision, the Supreme Court of Alabama. *See Green Tree Fin. Corp. v. Wampler*, No. 1970983, 1999 WL 667292, at *6 (Ala. Aug. 27, 1999) ("Where a . . . contract is silent on a particular question," a court cannot "indulg[e] an assumption that the proof would support a 'worst case' scenario.").

This conflict will encourage litigation in the Eleventh Circuit, where class action plaintiffs seeking to avoid arbitration agreements will not face as strong a presumption in favor of arbitration as they face in other circuits. The potential for such forum-shopping is a source of considerable concern to the members of the *amici* organizations who have arbitration agreements that apply to customers nationwide. Furthermore, the resulting pre-arbitration litigation will "frustrate the very purposes of the [FAA]," *Allied-Bruce*, 513 U.S. at 282 (O'Connor, J., concurring), which was designed to "avoid[ ] the delay and expense of litigation." *Allied-Bruce*, 513 U.S. at 280 (internal quotations omitted) (citing S. Rep. No. 68-536, at 3 (1924) and H.R. Rep. No. 97-542, at 13 (1982)). If a party seeking to block arbitration can embroil a party seeking to enforce an arbitration clause in detailed pre-arbitration court hearings, "most of the advantages inherent in arbitration are dissipated." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980); *see also Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 330 (D. Md. 1999); *Marc Rich & Co.*

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clause); *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998) (plaintiffs ordered to arbitrate fraud and conspiracy claims); *Pierman v. Green Tree Fin. Servicing Corp.*, 933 P.2d 955 (Okla. Ct. App. 1997) (plaintiff ordered to arbitrate fraud, civil conspiracy and other claims against Green Tree entity); *Ex parte Isbell*, 708 So. 2d 571 (Ala. 1997) (plaintiff ordered to arbitrate fraud, breach of contract, and other claims); *Ex parte Gates*, 675 So. 2d 371 (Ala. 1996) (plaintiff ordered to arbitrate fraud and other claims against assignee Green Tree).

v. Transmarine Seaways Corp., 443 F. Supp. 386, 387 (S.D.N.Y. 1978). In addition, the decision below creates serious problems for the arbitration clause drafter, who must anticipate every omission from the agreement that the Eleventh Circuit might later deem to serve as a basis for nullifying the agreement.

As if to prove that the mischief created by the Eleventh Circuit's decision extends beyond the issue of arbitration fees, a district court in that circuit recently relied upon it to invalidate an arbitration agreement on the grounds that defendants had "failed to demonstrate in this record that the National Arbitration Forum is a neutral, inexpensive and efficient forum to determine these claims as required by law." *See Baron v. Best Buy Co.*, 75 F. Supp. 2d 1368, 1370 (S.D. Fla. 1999) (citing *Randolph v. Green Tree Fin. Corp.–Alabama*, 178 F.3d 1149 (11th Cir. 1999)), *appeal docketed*, No. 99-14028 (11th Cir. Oct. 6, 1999). The *Baron* decision vividly demonstrates that the logic of *Randolph*, which places the burden of proof regarding costs on the party seeking arbitration, can and will be applied to other issues, such as arbitrator neutrality. Only review by this Court can correct this untoward development in the enforceability of arbitration claims.

Finally, it bears noting that the uncertainty created by the Eleventh Circuit's decision, which discourages banks and businesses from entering into arbitration agreements with consumers, ultimately harms consumers. "Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind." *Allied-Bruce*, 513 U.S. at 280 (citation omitted). For most consumers, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more

flexible in regard to scheduling . . . ." *Id.* (quoting H.R. Rep. No. 97-542, at 13 (1982)). As this Court emphasized in *Allied-Bruce*: "Indeed, arbitration's advantages often would seem helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation." *Id.* (citation omitted).

There is ample data that supports Congress' and the Court's belief in the advantages of arbitration for individuals.[6] For example, a study that compared employment claims filed with the AAA and in federal district courts found that, on average, arbitration resolved cases in half the time of litigation, and that individuals were four times more likely to prevail in arbitration. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). The Commentary to the National Arbitration Forum ("NAF") Bill of Rights similarly indicates that an individual plaintiff is more likely to win his or her case before the NAF than is a corporate plaintiff. *See* Arbitration Bill of Rights, National Arbitration Forum Commentary (1999) (available at http://www.arb-forum.com). By burdening banks and businesses that have offered and that would like to continue to offer arbitration, the Eleventh Circuit's decision makes it less likely that consumers will be offered the benefits of arbitration agreements in the future.

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[6] *See* Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Traps for the Weak and Unwary?*, 21 J. Corp. L. 331, 358 n.239 (1996) (citing Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, *in* Consumer Dispute Resolution: Exploring the Alternatives 313, 332 (American Bar Ass'n Special Committee on Dispute Resolution 1983)); *id.* at 33 n.10 (citing C. Edward Fletcher, *Arbitrating Securities Disputes* 176 (1990)).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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